Sweet Goods products so that the full sales potential of these advertised brands can be realized. You agree in requesting your members to cooperate with us in arranging special weekly promotions on said advertised brand items.

5. Deliveries of all products to your member stores pursuant to this agreement shall be made by our regular Wonder and Hostess route salesmen from their regular delivery trucks. We will give complete rack service and will be responsible for all stale returns.

6. Introduction into your member stores of products listed below will be made as soon as practical after August 10, 1964. At any time during the existence of this contract, we will discuss with you the addition of other items to be sold hereunder.

7. You agree to pay us for products produced and delivered under this contract at the following prices on weekly credit terms.

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.175	.185
1¼ Pound Round-Top Bread	.22	.235
1¼ Pound Sandwich Bread	.22	.235*
8 Pack Cluster Buns	.21	.23
8 Pack Coney Buns	.21	.23

The above prices will apply to both White and Wheat Bread if there are both varieties in the same weight category.

*This price was not in effect on June 1, 1964 but will be considered to have been in effect on that date for the purposes of this contract.

8. In the event you wish to purchase products with no stale returns to be absorbed by us, the prices will be as follows:

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.16	.185
1¼ Pound Round-Top Bread	.195	.235
1¼ Pound Sandwich Bread	.195	.235
8 Pack Cluster Buns	.20	.23
8 Pack Coney Buns	.20	.23

9. In the event you wish to purchase products on a drop-shipment basis to each of your member stores whereunder you will be responsible for rack service and stale returns, prices will be as follows:

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.15	.185
1¼ Pound Round-Top Bread	.185	.235
1¼ Pound Sandwich Bread	.185	.235
8 Pack Cluster Buns	.19	.23
8 Pack Coney Buns	.19	.23

10. All products hereafter sold by us to you pursuant to this agreement are hereby guaranteed not to be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, as amended, or any substantially similar state law. We agree to indemnify you against any claims made against you or losses sustained by you arising out of the purchase or use of products covered by this agreement provided such claims or losses do not result from your negligence or that of your agents and

employees and further provided we are notified within 15 days of any such claim or loss.

11. This agreement shall remain in effect for one year from the date hereof and thereafter from year to year provided, however, that either party may terminate this agreement on 60 days written notice. Upon any such termination, you agree to purchase from us at our cost all inventories of packaging materials and labels utilized in performing this contract. Inventories of such wrapping materials and labels shall be maintained in accordance with good business practice prevailing in the baking industry. Should this contract be terminated by you within one year from the date hereof, you agree to purchase from us at our original cost all plates and art work used in performing this contract not to exceed in any event $1,500.00.

12. It is anticipated that general price changes may occur from time to time in the various market areas covered by this contract. In the event that it is mutually agreed of a general price increase in any market on the controlled chain store brands above those in effect on June 1, 1964 the Private Label prices set forth in paragraph 7, 8 and 9 in that market will be increased by an amount equal to the increase in comparable items. If it cannot be mutually agreed that a price increase has occurred, the matter will be submitted to the American Arbitration Society.

13. In the event prices on any of our regular advertised products shall, in response to, a general price decrease in any market fall below the prices in effect as of June 1, 1964, then any private label price set forth in paragraphs 7, 8 and 9 shall be reduced in that market to a price at least one cent below the prices on our comparable advertised item.

14. Upon termination of this contract we agree to discontinue use of any brand names owned by you and utilized in performing this contract.

15. This offer is available to others in the same category, class or position.

Please signify your approval and acceptance of the foregoing terms and conditions by signing and returning the copy of this letter attached hereto.

Very truly yours,

CONTINENTAL BAKING COMPANY

By: /s/ JOHN R. BARSCH
Manager

Accepted:

Five States Supply, Inc.

By: /s/ LENHARD H. JOHNSON
President

Date: 8-10-64

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-227

CONTINENTAL BAKING COMPANY,
Petitioner,

vs.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION
Respondents.

BRIEF OF RESPONDENT INTERSTATE BRANDS CORPORATION IN OPPOSITION

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IN THE

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OCTOBER TERM, 1973

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CONTINENTAL BAKING COMPANY,
Petitioner,

vs.

THE OLD HOMESTEAD BREAD COMPANY and
INTERSTATE BRANDS CORPORATION
Respondents.

BRIEF OF RESPONDENT INTERSTATE BRANDS CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

Continental Baking Company has asked this Court to issue a writ because of the supposed importance of this case in permitting food companies to use private labels and pass cost savings to customers. This case in no way represents a typical "private label" market arrangement or problem. In 1962 the Continental Baking Company advised its stockholders that it had constructed the largest bread plant in the Rocky Mountains. (X p. 502) The plant was indeed enormous. It operated at 50% of capacity and

Continental's officers knew it could not break even until the tonnage increased to 75% of capacity.

"Regional Vice President Ward:

'Q. Well, do you know whether the plant—meaning the Denver plant—can operate at a profit when it is, let's say, running at fifty percent of capacity?

A. No it would not produce a profit at fiifty percent capacity.

Q. * * * What percent of capacity, in your opinion, would it have to operate at in order to show any profit at all?

A. I would say seventy-five to eighty percent.'" (R. 2078)

From 1963-1967 Continental Baking Company, the world's largest company of its kind, filed its enormous new Denver plant with tonnage obtained from its competitors and caused extended and permanent injury to competition.

The notion that this unprecedented three-year increase in production (33,000,000 pounds to 522,000,000 pounds) was a typical "private label" bread program is palpably absurd. (X. 825)

The regional executive officer of Continental—a Mr. Ward—who supervised "private label" programs in 14 states, testified that Continental had no pricing plans with the invidious and destructive terms used in Denver.

"Q. Do you have any contracts in your territory which price a private-label product to be a certain differential from the advertised-label product?

A. No.

Q. Do you have any written contracts which require that the private label products will be in the first position and your advertised label products and Hostess cakes will be in second position?

A. No, we do not." (R. 946.)

Yet, these unusual "terms" were the heart of the "Tender Crust" contract that filled Continental's coffers at the expense of industry competition (X. 849-52, 886, 917-19).

The wholesale bread industry is built on pennies. Key pricing and purchase decisions reflect the fungible nature of the product. All bread is the same. It is of like grade and quality (R. 776). The largest independent buyer in the market (Mr. Johnson of A.G.) testified that the products sold under a variety of labels were of identical quality.

> "Q. And these [products—Tender Crust, Wonder, Town Talk, Butternut, Rainbo] are like kind and quality, is that correct?
> A. That's correct." (R. 608)

In late 1967, on the eve of Old Homestead's receivership, Continental had tied up by discriminatory and unlawful pricing virtually every independent account. The pricing directly effected primary live competition—which was injured or destroyed.

The writ unfairly and inaccurately suggests that the only issue determined by the jury was the discrimination beween private label and regular brand of merchandise and compounds that error by suggesting that the same product, meaning private label, was available to all customers at the same price. The facts on which the jury based its determination are quite different. Continental Baking Company had at least five labels on the market. Their regular label, Wonder Bread, and, in addition, Tender Crust (A.G. Stores), Oak Farms (7-11 Stores), Red Owl (Red Owl Stores) and Gem (a label for another group of supermarkets).

The price to Associated Grocers and the discriminations involved were as follows:

	Regular Price	A.G. Price	% of Discrimination
1964 (August-Sept.)	18.5	15	18.8
1966 (August-Sept.)	21	18.4	12.4
1967 (August-Sept.)	16	13.05	18.9

Continental discriminated not only between the Tender Crust or Associated Grocer price compared to the regular Wonder Bread price but also discriminated between private labels. On the eve of Old Homestead's receivership and for an "indefinite" period, Continental instituted the following price changes:

RECOMMENDATION FOR PRICE CHANGE

Continental — Denver, Colorado — 11/15/67

Continental	From	To	Competitor	From	To
1# Wonder	21	16	Rainbo 1#	21	16
1# Tender Crust	20	15	None		
1# Oak Farm	20	15	None		
1# Red Owl	20	15	None		
1# Gem	20	15	None		

Effective Date 11/16/67 to indefinite

The *list price* of Tender Crust label bread was not actually used; a discount of up to 11% applied and a 2% central billing further reduced the payment by typical A.G. stores. (X. 885-88).

In the fall of 1967 and for an indefinite period, the regular label would be priced at 16¢ and the Tender Crust label for Associated Grocers would get as low as 13.05¢ because of two discounts, one of 2% and another of 11%, applied to the Tender Crust list price of 15¢.

Wonder Bread — list price regular label		16 ¢
Tender Crust — list price		15 ¢
Less discounts of		
2% and 11%	1.95¢	13.05¢
Price difference		2.95¢
Percentage discrimination ..		18%

Continental sold other labels at discriminatory prices: Red Owl, Gem and Oak Farms private labels were priced at 15¢ per unit when the Tender Crust label was selling for 13.05¢ (X. 886, 915; *supra* at pp. 8-9). Continental did not present even the pretext of a defense to that discrimination. The author of the cost study, a Mr. Swan, testified on cross-examination that the cost study did not even purport to justify any differences between Tender Crust customers who purchased under different discounts (R. 1648-49).

Continental therefore had four discriminations:

First, between regular customers and Tender Crust.

Second, between different Tender Crust purchasers, some buying at one discount, some buying at another discount.

Third, discriminations between Tender Crust private label customers and other private label customers (R. 912).

Finally, Continental was discriminating between private label customers—other than Tender Crust—and regular customers. This would include the favored Red Owl Stores, Oak Farm Stores, Fleming accounts and the Gem Stores, each of which during the period involved in this case received a private label price which was substantially lower than regular label. (R. 1960).

The private label Tender Crust program used by Continental thus discriminated among buyers of private label products as well as the regular branded merchandise. The plan was unique and not typical. It removed the independent grocer from general competition. It was maintained by a unique term which required Continental to drop its price below *any competitive price* (our point 623) and guaranteed to Continental the entire group of AG independent stores. It further required Continental to provide weekly specials at reduced prices and forced each store to use the regular Wonder Bread product as a secondary label (R. 628, 632, 850, 913-14; X. 850, 885). The plan grew from its initial 70 members purchasing $10,000 a week to 250 independent stores purchasing $40,000 a week (R. 691, X. 833-42). The suggestion that this "private label" program is a typical industry sales program is simply erroneous.

REASONS FOR DENYING WRIT

I. "Private label" pricing that discriminates between brands on products of "like grade" and quality is unlawful.

The Supreme Court in the evaporated milk case directly ruled on this issue:

> "The Commission's construction of the statute also appears to us to further the purpose and policy of the Robinson-Patman Act. Subject to specified exceptions and defenses, §2(a) proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact. We doubt that Congress intended to foreclose these inquiries in situa-

tions where a single seller markets the identical product under several different brands, whether his own, his customers' or both. Such transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of §2(a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal." *FTC* v. *Borden Co.*, 383 U.S. 643, 644.

II. Causation: The jury determined that Continental's pricing caused damage to the industry, removed a competitor and tended to monopolize the market.

In this petition, Continental offers a unique legal justification for this predatory conduct. The issue is variously phrased: otherwise unlawful discriminations cannot be "causily" connected to the private label sales or, citing the Borden case in the Fifth Circuit or the Beatrice-Kroger FTC case, it is suggested that there is an "absence of any connection" between the market, damage and private label discriminations. Finally, it is suggested that the whole program was legal because it was "available."

No matter how it is said, Continental seriously suggests that this Court publish and endorse a ruling which excuses the outright discrimination of an independent competitor and a substantial general effect on competition caused by labeled discriminatory and below cost pricing on the theory that a "private label" should simply be treated differently. The Court should not accept that argument for the following reasons:

The jury decided all of these issues contrary to Continental's position. The jury found a violation of the Sherman Act as well as the Robinson-Patman Act. The jury had ample evidence to support the position that Con-

tinental's pricing was predatory and injurious to competition. Further, as discussed *supra*, they maintained for months the low cost pricing which made it impossible for competition to remain in the market. In this connection, the jury was repeatedly instructed that the Robinson-Patman Act declares unlawful price discriminations if the requisite competitive effects are shown (R. 2633). This admonition was repeated:

> "It must also appear that there was an injury to competition and that there was a tendency to create a monopoly as a result of the discriminatory sales or practices." (R. 2634)

The evidence established such competitive effects:

First, the private label plan—as discussed *supra*—was not typical of such pricing; it instigated price wars because if any competitor met the Associated Grocer Tender Crust price, the terms of that agreement required Continental to further reduce the price to always be below a competitor. Continental's plant manager testified as follows:

> "Q. So, when a wholesale baker competitor of yours would lower his advertised label down to near the private label price, you would, in turn, further lower the price on private label, is that right?
>
> A. This is generally correct.
>
> Q. And it is that competitive play that caused the price to get down, at one time, at least, to fifteen cents?
>
> A. That's correct." (R. 2083)

Rainbo's sales manager put it this way:

> "Q. And what is the effect of [Tender Crust's] sliding scale discount upon the other wholesale bakers serving the market area?
>
> A. Well, in short, the more that a grocer can sell of his program, *the larger his discount*, so it has a

direct bearing on the space allocation for your outside bakers. . ." [Emphasis added] (R. 2228)

Second, Continental, excluding companies such as Safeway and Millers who produce their own bread, increased its market share from roughly 32% to roughly 50% and eliminated a major competitor (Old Homestead).

Third, the jury had the right to find based on the evidence that Continental's price was simply below cost. Throughout extended periods, Continental sold private label bread at 15¢ to 16¢. Mr. Swan, who was the author of a rejected cost defense, testified as follows:

"Q. Now, if your thesis is correct, sir, if you sold [Wonder Bread] at anything below 18.86 cents, you would be selling below cost, is this correct?

A. That's correct.

• • •

Q. And it would necessarily follow that if you sold the Tender Crust product below 16.59 cents you would be selling that below cost, is this correct?

A. I would say based on this, yes." (R. 1646).

Since the Tender Crust bread was selling at 13.05¢ and Wonder Bread at 16¢, the jury logically concluded that Continental was repeatedly selling bread products below cost.

Fourth, Continental constructed a plant which was so enormous that the existing volume of business automatically put the plant in the red because it could not operate profitably at 50% of its capacity. It was only after Continental acquired all of the independent business in the market that the company operated at 75% to 80% of capacity, which was directly responsible for "putting the plant in the black" (R. 2078, 2080).

Sixth: The Tender Crust program was thus far more than a selective temporary price adjustment typical of the give and take between competitors. It was rather a gross elimination and destruction of competition.

The plan removed the independent grocers from general competition. The plan resulted in discriminations varying from 12% to 20% off the list price to guarantee to Continental the business of the entire group of A. G. Stores. The plan was maintained by a unique term which *required* Continental to drop its price below *any* competitive price (R. 623). It was designed to beat—not meet—competition and insulated the acquired accounts from fair and normal competition. The plan required Continental to provide weekly specials at reduced prices to support permanent weekly Wonder Bread products. The plan forced each store to use *Wonder* Bread as a second label (R. 628, 632, 850, 913-14; X. 850, 885).

The plan—finally—grew from its initial 70 members ($10,000 per week) to over 200 independent stores ($40,000 per week) (R. 691; X. 833-42). The independent stores who received these benefits from Continental were generally loyal to the program throughout (X. 648).

These pricing practices substantially injured competition. At the start of the program 4 wholesale bakers competed in the market—Continental; Rainbo; Interstate; and Old Homestead. The weaker—local—operator is now in receivership. The testimony on causation is explicit. Without a fair share of the available independent business, it is impossible to operate at a profit [plant manager Starr, R. 1957-58]—Old Homestead could do nothing to compete with a program that required Continental to repeatedly drop the price structure when any competi-

tor sought to hold on by "meeting" Continental (R. 1265-66).

III. Petitioners reliance on the Borden or Beatrice private label litigation is misplaced: both of those proceedings involved pricing which was not predatory.

As discussed fully *supra,* this case does not involve the success of the typical private label program. Continental suggests that private label was granting some form of immunity in *FTC* v. *Beatrice Foods Co. and Kroger Co.* The Commission said no such thing but carefully observed that primary line injury could either be based on "proof of predatory intent" or a market analysis sufficient to show "a reasonable probability of injury to competition."

> "• • • a finding of primary line injury might be based either on proof of predatory intent or on a market analysis, sufficient under the circumstances of the case to raise a reasonable probability of injury to competition. *National Dairy Products Corp.* v. *FTC,* 412 F.2d 605, 612-13 (7th Cir. 1969). In the present case there is neither a showing of predatory intent nor a sufficient market analysis to support a finding of competitive injury." (R. 2835).

The Commission simply concluded "nothing of this sort [predatory activities] appears in the present case." (R. 2835). Moreover, the evidence in that case supported a finding that Beatrice actually suffered by losing a substantial amount of business (R. 2837).

If Continental's argument were accepted, the Federal Trade Commission would have disposed of this injury point by simply noting that differences between private label and regular label cannot cause injury to competition.

The Commission did no such thing and the lesson to be learned from *Beatrice-Kroger* is that discriminations involving private label may well serve as the basis of primary line injury if predatory intent or injury to competition is shown. This record amply demonstrates sales below cost and the increase in Continental's production (a 50% growth) directly resulting from unlawful pricing. The record in this case shows Continental's actual destruction of one of four viable competitors. It shows protracted damage to competition covering many years of repeated deep price cuts, precisely those facts which the Commission observed are material to this question. The fact that Beatrice in a private label contract did not injure competition or use predatory below cost pricing is hardly a defense to Continental. The mistake running through Continental's argument is based on an assumption that these cases were decided because private label has some basic immunity under the law, but that is not so. The "immunity", if any, given to Beatrice was based on the fact that its private label argument, unlike Continental's did not involve repeated price cuts, below cost pricing and disastrous damage to the industry.

The Federal Trade Commission case involving Borden's private label milk went to the Supreme Court and was remanded to the Court of Appeals. The Supreme Court could well have simply stated that there was no violation of law because private label milk was not causily connected to other milk products. This Court did no such thing, however, and remanded the case with specific directions to determine the factual issues.

A comparison of the evidence reviewed by the Fifth Circuit and the evidence in this case viewed most favorably

—to support the jury verdict—shows a dramatic contrast:

Borden did not use "below cost or unrealistically low prices" on private label (381 F. 2d at 177); Continental did—all prices were below cost for extended periods.

Borden did not include "any device similar to the conventional volume discount" (381 F.2d at 177); Continental used such a price—and throughout the period provided indirect discriminations in the form of permanent weekly specials.

Borden was not "in any sense guilty of predatory behavior" (381 F. 2d at 177); Continental was. The very contract used by Continental, unique to the Denver market, required below cost pricing for the express purpose of filing up a plant built 50% over Continental's existing capacity.

Borden's "share of the market increased only" from 9.9% to 10.7% (381 F. 2d at 179); Continental's growth was much more dramatic, reflecting a 50% increase in total tonnage, at least a 9% increase in market share and, excluding Safeway and others who baked their own bread, Continental's share of the available market could well have increased to almost 50%.

In the *Borden* case, there was no showing that the creased their market position; in Denver one of four competitors was destroyed and both Interstate and Rainbo sustained substantial drops in production.

In the *Borden* case, there was no showing that the lower private label price caused any trade diversion or effect on competition; under Continental's plan, the Tender Crust business alone grew from $10,000 a week to $45,000 a week, exclusive of the Red Owl, 7-11, Gem and Fleming accounts, which also involved private label at discriminatory prices. Continental succeeded in removing from ordinary competition the heart of the Denver market.

There is in short no analogy whatever between the *Borden* case and the Continental case, except that both involved sale of a private label. The existence of private label in both cases establishes no legal excuse for Continental's conduct as described *supra*. The bread industry has many private label programs, none of which led to the destructive price wars caused by the peculiar price mechanism requiring automatic below cost price reductions by Continental under a written agreement, which automatically reduced Continental's price in the event that a competitive offer—at any level—was received.

IV. The jury determined that Tender Crust was not "available" to all customers in the same program.

Finally—Continental asks to be excused from the effects on the market by suggesting that private label was "available" and therefore the Tender Crust program is legal.

The law does not require any instruction to the jury on availability when the conclusive evidence shows that regular customers were not offered the program. Here again the Court used instructions which favored Continental's position. The Court stated: "Now, I have been asked to clarify the fact that if this Tender Crust was offered indiscriminately to everybody, why, there is no violation whatsoever." (R. 2659). In essence the Court stated that the jury should find in favor of Continental, if the program was offered generally. A jury question was created and decided adversely to Continental.

Private label bread was sold at a variety of prices. Continental, for example, had discriminations between its own private label sales (R. 912). In the fall of 1967 the Red Owl label and the Oak Farms label (7-11) were sold at 15¢ and Tender Crust at 13.05¢ (15¢ less the discounts).

Moreover, Continental's obligation is not to discriminate between customers who buy from Continental. If the retailer or grocery store can get a private label someplace else, that may be material to a secondary line case, but it has absolutely no relationship to a primary line case in which Continental's unfair discriminatory pricing took customers away from other bakeries and destroyed their business.

Continental clearly did not make the Tender Crust program which it sold available generally (R. 693):

> "Q. And the question of who you offered it to, the program was designed for AG stores, isn't that right?
> A. That's right.
> Q. And in going around to talk to the AG stores, it is my understanding that you did not solicit for the program the non-AG stores, is that right?
> A. That's right."

Moreover, Continental admitted in its answers to interrogatories that at least 253 charge account customers and an unestimated number of cash customers purchased Wonder label bread at the regular list price (R. 2075). Continental would have the Court—and the jury—believe that these customers "rejected" lower prices and preferred to pay a higher price. There is, of course, no showing whatever that Continental made private label offers to any customer who purchased at the higher prices on the regular Wonder Bread list.

CONCLUSION

The petition for a writ should be denied: This case does not represent a typical "private label" bread contract but

rather involves a predatory pricing system in which discriminations occurred between private labels—as well as the more conventional discrimination between regular and private labels. The pricing of Continental was below cost and destructive. No conflict exists between the decision of the Tenth Circuit in this case and Borden's private label case reviewed by this Court and the Fifth Circuit. The jury was properly instructed and determined with substantial record support that the private label pricing caused the elimination of a competitor, damage to competition and a tendency to monopolize the market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Brief of Respondent Interstate Brands Corporation in Opposition of Continental Baking Company and on Old Homestead Bread Company by mailing three copies of the same, airmail postage prepaid, to their respective counsel of record, John H. Schafer, 888 16th Street, N.W., Washington, D.C. 20006, E. Edward Bruce, Covington & Burling, 888 16th Street, N.W., Washington, D.C. 20006 and John S. Pfeiffer, 1900 Security Life Building, Denver, Colorado 80202. All parties required to be served have thus been served.

Edward L. Foote

September 18, 1973

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IN THE

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OCTOBER TERM, 1973

No. 73-227

CONTINENTAL BAKING COMPANY, *Petitioner*,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A few comments are required in response to the briefs filed by respondents in opposition to Continental Baking Company's petition for certiorari.

I. RESPONDENTS HAVE ATTEMPTED TO INTRODUCE EXTRANEOUS ISSUES TO OBSCURE THE NATURE OF THE RULING BELOW.

Respondents in their briefs and oppositions take a tack typical of parties attempting to preserve lower court judgments from this Court's scrutiny. They ignore the function of intermediate appellate courts, whose task is to refine and narrow issues, and seek to introduce a variety of contentions and issues not ruled upon by the Court of Appeals in order to obscure the nature of the rulings which that court did make. Thus, despite the fact that the Court of Appeals affirmed the trial court's judgments solely on the basis of the Robinson-Patman Act,[1] respondents introduce a host of arguments that have nothing to do with that statute, but instead concern only matters relevant to Sherman Act claims, such as the attack upon shelf-space allocation under the Tender Crust program, the alleged retail price maintenance by Continental, and the fixed relationship of prices between Tender Crust and Continental's advertised label product.

Continental met and refuted each of these arguments in dealing with Old Homestead's Sherman Act arguments below, and at the very least it can be said that

---

[1] Old Homestead claims that the Court of Appeals affirmed the trial court's judgments on Sherman Act theories, as well as the Robinson-Patman Act. (OH Br. 1-2, 19-20) This claim is frivolous. The court below expressly stated:

> "In this opinion we give consideration only to the Robinson-Patman aspect of this litigation." (Petn. App. 6a.)

The court's use of the term "verdicts" in the concluding language of its opinion refers, of course, to the two verdicts in favor of Old Homestead and Interstate on their Robinson-Patman claims.

the Court of Appeals did not indicate any agreement with those Sherman Act contentions. Of course, if the Court grants certiorari and agrees with Continental's view of the Robinson-Patman Act, Old Homestead would have a full opportunity on remand to once again attempt to convince the Tenth Circuit to affirm the Sherman Act judgments. But in the meantime, this Court should not let respondents' obscurant tactics succeed in deflecting its attention from the significant Robinson-Patman issues decided below.

II. THERE IS A SQUARE CONFLICT BETWEEN THE DECISION BELOW AND THE FIFTH CIRCUIT'S BORDEN DECISION.

Paralleling their efforts to introduce irrelevant Sherman Act considerations in this Court, respondents attempt to distinguish the Fifth Circuit's analysis of the Robinson-Patman Act in *Borden Co.* v. *FTC,* 381 F.2d 175 (1967), by recourse to extraneous contentions that are both legally irrelevant and factually unsupported.

The issue at this stage in the litigation under the Robinson-Patman Act is simple and clear cut: Can a Robinson-Patman Act judgment be predicated upon a mere difference in price between private and advertised label goods without any showing that lower prices on private label were subsidized or otherwise made possible by higher prices on advertised products? The Fifth Circuit squarely held that a mere price difference on private label which was unsupported by higher advertised label prices is not condemned by the Robinson-Patman Act. The Tenth Circuit, in affirming a verdict which was based upon a record that conclusively demonstrated the lack of any connection between pri-

vate label prices and higher advertised label prices, has plainly held to the contrary. Thus, there is a division between the circuits on an issue of great significance under the antitrust laws.[2]

Significantly, neither respondent attempts to refute Continental's showing that there was no evidence in the record in this case that its Tender Crust prices were supported by its higher Wonder prices. Instead, both allege that Continental was guilty of predatory conduct and that primary line competition in the wholesale baking industry was injured by the Tender Crust program.

As respondents own briefs demonstrate, proof of predatory intent in a Robinson-Patman Act case pertains only to a showing that there was probable injury to competition, one of the elements required by the statute to sustain liability. (OH Br. 10; IBC Br. 11) The aspect of the *Borden* case relied upon by Continental does not in any measure turn upon the absence of predation or injury to competition. It instead pertains to "the absence of the necessary causal relationship between the difference in prices and the alleged competitive injury." 381 F.2d at 180. For after deter-

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[2] Respondents' briefs highlight a further conflict on a related issue justifying certiorari in this case. Old Homestead relies upon Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277 (7th Cir. 1966), for the proposition that in area price discrimination cases it is not necessary to find that lower prices in one market are supported by higher prices in another. (OH Br. pp. 10-11) Continental noted this decision, but also cited a directly conflicting Ninth Circuit opinion, Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (1955), *cert. denied*, 350 U.S. 991 (1956). (Petn. pp. 12-13) The Court could resolve the conflict between the circuits on that issue in the course of resolving the conflict presented by the decision below.

minimis that the FTC had not shown Borden's private label prices were supported by its higher advertised label prices, the Fifth Circuit concluded that

> "[I]njury proven in the primary line, if any, is not *the effect* of the price differences in issue." *Ibid.* (Emphasis in original).

Thus, respondents' claims concerning Continental's alleged predatory behavior and the alleged injury to competition resulting from the Tender Crust program do not avoid the conflict between the ruling below and the Fifth Circuit's *Borden* opinion.

Moreover, on the facts, the claims as to predatory behavior are without support. Continental did not sell below cost except, as the Court of Appeals found, "during a very short period" (Petn. App. 9a) at the very end of 1967 when market prices were driven unusually low by Rainbo's aggressive pricing. (JA 1649, X 113-115). The fact that Continental built a plant which anticipated growth is clearly not inconsistent with the trial court's own observation that there was no evidence of predatory conduct. (JA 2294.) And, finally, a price increase announced two weeks before it was known that Old Homestead was going out of business simply is not evidence of a design to eliminate Old Homestead. If anything, it shows an effort on Continental's part to restore profitable prices. (JA 919-20, 994.)

Finally, Old Homestead appears to try to avoid the impact of the *Borden* analysis by arguing that the private label price was contractually tied to the advertised label price so that Old Homestead was, indeed, injured by the difference in prices. Since all private label merchandise must be sold by manufacturers for

less than advertised label goods, this is just another way of arguing that the *Borden* analysis should be rejected. If respondents were injured at all by Tender Crust, it was not because of any dependence of Tender Crust prices on Wonder prices, but because of the independently determined lower Tender Crust prices. And as the *Borden* case made clear, the Robinson Patman Act does not proscribe low prices.

III. CONTINENTAL WAS DENIED THE OPPORTUNITY TO HAVE THE JURY CONSIDER ITS AVAILABILITY DEFENSE.

In their continuing efforts to confuse the issues decided below, respondents interject a variety of irrelevant and immaterial considerations in response to the arguments in Continental's petition concerning the availability defense. Thus, they argue that a discount on one of its private label brands deprived Continental of that defense. But as respondents own briefs show, the jury was not even permitted to consider the availability of other Continental private label products as a defense to the alleged discrimination involved in the Tender Crust program. (Oll Br. 18; Hbc Br. 14) It was instead instructed that there would be no violation only if the Tender Crust label itself was "offered indiscriminately to everybody . . . ." (JA 2659) The jury was, thus, not allowed to consider Continental's explanation for any differences in price between its various private labels.[8] Its proof that discounts under the Tender Crust program were offered

[8] By and large, Continental offered private label bread to all of its customers under the same terms and conditions. It was only on two occasions that Continental had to grant special discounts to Tender Crust purchasers to meet the lower prices offered by Rainbo. (X 864, 886)

solely to meet the competition of other wholesale bakers (principally Rainbo) was treated as legally irrelevant.

Accordingly, this case squarely presents the issue as to whether the availability of private label bread to all customers in the market stands as a defense to an attack upon a particular private label program.

IV. THE DECISION BELOW, IF UNCORRECTED, WILL VITIATE PRIVATE LABEL MERCHANDISING TO SMALL RETAILERS.

As we have demonstrated above, the Tenth Circuit's disregard of the Fifth Circuit's rule in the *Borden* case and its refusal to require even an instruction on the availability defense cannot be distinguished away by any alleged peculiarities or unique aspects of the Tender Crust program. The rule that emerges from the Tenth Circuit's opinion is that any private label price that is below an advertised price, even if it stands on its own bottom and even if other private label is available to all other customers in the market, will justify sending a Robinson-Patman Act case to a jury, so long as the plaintiff can introduce some minimal evidence concerning probable injury to competition, such as increased sales by the defendant, etc. Under these circumstances no manufacturer can reasonably be expected to take the risk of selling private label products to independent retailers that will allow them to compete with their vertically integrated chain store competitors.

The result sanctioned below is distinctly at odds with the basic purpose of the Robinson-Patman Act, which was to allow more effective competition between small retailers and large chains. The rule of law relied upon

by the court below should not therefore be allowed to stand unless this Court is convinced that it is required by the Robinson-Patman Act. Since the only other court of appeals that has squarely confronted this issue has held that it is not, the Court should give this matter its most complete and considered attention.

The writ should be granted.

Respectfully submitted,

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